

2006

Neldon Paul Johnson v. Ina Marie Johnson : Brief of Appellee

Utah Court of Appeals

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Recommended Citation

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IN THE UTAH COURT OF APPEALS

NELDON PAUL JOHNSON,
Appellant/Respondent,
vs.
INA MARIE JOHNSON,
Appellee/Petitioner.

Court of Appeals No. 20060290
Civil No. 010500391

PETITIONER'S OPENING BRIEF ON APPEAL

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FILED
UTAH APPELLATE COURTS
OCT 24 2006

IN THE UTAH COURT OF APPEALS

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 NELDON PAUL JOHNSON,

 Appellant/Respondent,

 vs.

 INA MARIE JOHNSON,

 Appellee/Petitioner.

PETITIONER'S OPENING BRIEF ON APPEAL

Appeal from the Decision of the Utah Fourth District Court

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APPELLANT'S BRIEF

Appellant Neldon P. Johnson submits this opening brief in appeal before this Court.

LIST OF ALL PARTIES TO THE PROCEEDING BELOW

The Appellant

Neldon P. Johnson

The Appellee

Ina Marie Johnson¹

¹Ina Marie Johnson will be referred to throughout this brief as “Mrs. Johnson” for purposes of consistency. It should be noted that Ina has been divorced from Neldon Johnson and has remarried.

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JURISDICTION OF APPELLATE COURT

The jurisdiction of all appellate courts “shall be provided by statute.”² Section 78-2a-3(2)(h) of the Utah Code, provides that the Utah Court of Appeals has jurisdiction over appeals from the district court for domestic relations cases, including divorce. This is an appeal from the final judgment of the Fourth Judicial District Court regarding a domestic relations case.

ISSUES PRESENTED FOR REVIEW AND STANDARD OF REVIEW

1. Did the lack of essential contract terms regarding the trust deed and trust deed note and the number of parcels to be transferred make the stipulated Amended Decree of Divorce ambiguous and/or unenforceable?

Standard of Review: Interpretation of the terms of a contract is a question of law. Therefore the appellate court gives the trial court's conclusions regarding the contract no deference and reviews them for correctness." *Nova Cas. Co. v. Able Const.*, 983 P.2d 575, 578 (Utah 1999).

2. Did the modifications of the trust deed and trust deed note by the Court, without the consent of Mr. Johnson, make the stipulated Amended Decree of Divorce ambiguous and/or unenforceable?

² Utah Const., Article VIII, § 5.

Standard of Review: Interpretation of the terms of a contract is a question of law. Therefore the appellate court gives the trial court's conclusions regarding the contract no deference and reviews them for correctness." *Nova Cas. Co. v. Able Const.*, 983 P.2d 575, 578 (Utah 1999).

3. Was the stipulated Amended Decree of Divorce ambiguous and/or unenforceable because the parties failed to have a meeting of the minds on the integral features of how many parcels were going to be deeded to Mrs. Johnson and the terms and conditions of the trust deed and trust deed note?

Standard of Review: Interpretation of the terms of a contract is a question of law. Therefore the appellate court gives the trial court's conclusions regarding the contract no deference and reviews them for correctness." *Nova Cas. Co. v. Able Const.*, 983 P.2d 575, 578 (Utah 1999).

4. Was the stipulated Amended Decree of Divorce ambiguous and/or unenforceable because it lacked sufficient definiteness to be enforced?

Standard of Review: Interpretation of the terms of a contract is a question of law. Therefore the appellate court gives the trial court's conclusions regarding the contract no deference and reviews them for correctness." *Nova Cas. Co. v. Able Const.*, 983 P.2d 575, 578 (Utah 1999).

5. Is the use of contempt proceedings barred by the one-action rule in Utah Code Ann. § 78-37-1 where the parties agreed in the stipulated Amended Decree of Divorce that a trust deed and trust deed note would secure the property settlement?

Standard of Review: Interpretation of the terms of a contract is a question of law. Therefore the appellate court gives the trial court's conclusions regarding the contract no deference and reviews them for correctness." *Nova Cas. Co. v. Able Const.*, 983 P.2d 575, 578 (Utah 1999). Legal determinations concerning the proper interpretation of a statute are reviewed for correctness, and therefore the Court of Appeals should apply a de novo standard here. *Platts v. Parents Helping Parents*, 947 P.2d 658, 661 (Utah 1997).

6. Does the use of contempt proceedings violate article I, section 16 of the Utah Constitution where the contempt proceedings are used to enforce a property settlement secured by a trust deed and trust deed note, where the property settlement does not involve either alimony payments or child support payments?

Standard of Review: A matter "of statutory interpretation [is] a question of law that we review on appeal for correctness." *State v. Schofield*, 63 P.3d 667 (Utah 2002).

7. Is the use of contempt proceedings prior to July 1, 2006 appropriate when the parties agreed in the stipulated Amended Decree of Divorce that a balloon payment on July 1, 2006 would be used to pay for any outstanding payments under the Amended Decree of Divorce?

Standard of Review: Interpretation of the terms of a contract is a question of law. Therefore the appellate court gives the trial court's conclusions regarding the contract no deference and reviews them for correctness." *Nova Cas. Co. v. Able Const.*, 983 P.2d 575, 578 (Utah 1999).

8. Was it erroneous for Judge Howard to hold that the issues in Mr. Johnson's Motion to Set Aside Decree of Divorce dated January 13, 2006 were res judicata.

Standard of Review: The determination of whether res judicata bars an action presents a question of law. "When reviewing questions of law, we accord no particular deference to the conclusions of law made by the court but review them for correctness." *State v. Christensen*, 866 P.2d 533, 535 (Utah 1993).

9. Was it erroneous for Judge Howard to award a judgment to Mrs. Johnson in the amount of \$223,982.97 for monthly payments under the stipulated Amended Decree of Divorce when two parcels of property had been inadvertently deeded to Mrs. Johnson, where the value of the property far exceeded the amount owing and where the monthly payments had been secured by a trust deed and trust deed note and the parties had stipulated to a balloon payment in July 2006 for any past due payments.

Standard of Review: Interpretation of the terms of a contract is a question of law. Therefore the appellate court gives the trial court's conclusions regarding the contract no deference and reviews them for correctness." *Nova Cas. Co. v. Able Const.*, 983 P.2d 575, 578 (Utah 1999).

10. Was it erroneous for Judge Howard to award attorney's fees incurred by Mrs. Johnson prior to the filing of the order to show cause?

Standard of Review: Whether attorney fees are recoverable in an action is a question of law [that] we review for correctness." *A.K. & R. Whipple Plumbing & Heating v. Guy*, 47 P.3d 92 (Utah App. 2002)(citation omitted), *aff'd*, 94 P.3d 270 (2004).

11. Was it erroneous for Judge Howard to award attorney's fees to Mrs. Johnson for any fees other than those incurred for preparation and attendance of the January 23, 2006 hearing.

Standard of Review: Whether attorney fees are recoverable in an action is a question of law [that] we review for correctness." *A.K. & R. Whipple Plumbing & Heating v. Guy*, 47 P.3d 92 (Utah App. 2002)(citation omitted), *aff'd*, 94 P.3d 270 (2004).

STATEMENT OF THE CASE

Nature of the Case:

This matter is a divorce case. The parties reached a stipulated settlement that was entered by the Fourth Judicial District Court as an Amended Decree of Divorce.

Course of Proceedings and Disposition Below:

The district court entered a Decree of Divorce on June 6, 2001. (R. 309-310). The decree was based upon Findings of Fact and Conclusions of Law entered by the district court on the same date. (R. 307-308). Thereafter, the parties reached a stipulated settlement

agreement that was read into the record and accepted by the district court and memorialized in the Amended Decree of Divorce (Appendix 1., R. 320 - 326) and the Amended Findings of Fact and Conclusions of Law (Appendix 2., R. 311-318). Pursuant to the Amended Decree of Divorce, Mr. Johnson's counsel prepared a trust deed, trust deed note and quit-claim deed. Mr. Johnson signed the trust deed note, the trust deed and the quit claim deed on August 28, 2002. (R. 834-838). The trust deed was recorded on September 4, 2002 as entry 102294:2002 with the Utah County Recorder. (R. 833-834). The quit-claim deed was recorded on September 4, 2002 as Entry No. 102293:2002 with the Utah County Recorder. (R. 828-831). Mr. Johnson's counsel filed a Notice of Execution and Recordation of Deeds and Execution of Note with the district court on September 24, 2002. (R. 840). The notice contained a copy of the executed and recorded trust deed, trust deed note and quit-claim deed. (R. 828-840). Mrs. Johnson subsequently requested an order to show cause hearing alleging that Mr. Johnson was in contempt of court for not making the monthly payments under the decree of divorce. (R. 1824). The matter was presented to Commissioner Patton wherein Commissioner Patton denied Mrs. Johnson's Order to Show Cause, but unilaterally, without any objection from Mrs. Johnson or her counsel, found the trust deed recorded by Mr. Johnson was "contemptuous" and Commissioner Patton was "offended by the trust deed." See March 7, 2003 Hearing, pg. 46 lines 1-4 and pg. 47 lines 5-8 (R. 1824). The Commissioner ordered Mrs. Johnson's counsel to prepare a new trust deed with an acceleration clause that if Mr. Johnson was not current by December 1, 2003 on his obligations under the trust deed note then the entire outstanding balance becomes due and

payable on the entire outstanding balance. *Id.* at pg. 49, lines 8-15 (R.1824). Mr. Johnson's counsel filed an objection to the trust deed and trust deed note prepared by Mrs. Johnson's counsel that was heard before Judge Claudia Laycock on July 28, 2003. (R. 1823)

At the July 28, 2003 hearing, Judge Laycock granted Mr. Johnson's objection in part, denied it in part, and ordered Mrs. Johnson's counsel to amend the trust deed note. See July 28, 2003 Hearing, pg. 70 lines 11-17 (R. 1823). Judge Laycock also reviewed Mr. Johnson's Motion to Set Aside the Amended Decree of Divorce. *Id.* at pg. 70. Judge Laycock found the decree unambiguous. *Id.* at pg. 74 lines 6-12. The Order Denying the Motion to Set Aside the Divorce Decree was never signed by Judge Laycock, but was eventually signed by Judge Howard on February 7, 2006. R. 1704-1707. In addition, Judge Howard signed several other unsigned orders from matters that had been before Judge Laycock, including the Order Denying Objection to Prior Order of Attorney's Fees (R. 1715-1717), Order on Objection to Order on Order to Show Cause (R. 1712-1714), Order Regarding Objection Regarding Community Service (R. 1708-1711), and the Order on Objections to Trust Deed and Trust Deed Note R. (1699-1703). As the record reflects, none of the orders signed by Judge Howard were sent to Mr. Johnson's counsel, but the orders were signed with the originate certificate of mailing dated July 30, 2003. On February 23, 2006, the district court entered a subsequent ruling and order entitled "Ruling and Order: Re Respondent's Objection to Newly Prepared Trust Deed Note and Trust Deed." (R. 1731-1735). A copy of the order was sent to Mr. Johnson's counsel by the district court. (R. 1731). On the same date, the district court entered a ruling entitled "Ruling Re: Order to Show Cause." (R. 1737-1741).

Finally, the district court entered an order entitled “Order, In Re: January 23, 2006 Hearing” that was signed by the district court on February 27, 2006. (R. 1758-1761).

Facts established in the Record below:

1. The parties in the present action were married on May 3, 1964. Findings of Fact and Conclusions of Law, Findings of Fact ¶ 2. (R. 307-308)
2. The parties were divorced on June 6, 2001 in a bifurcated proceeding. Findings of Fact and Conclusions of Law, Conclusions of Law ¶¶ 1-2. (R. 307)
3. An Amended Decree of Divorce was negotiated between the parties and entered on June 27, 2001. (R. 311-326)
4. Both parties were represented by counsel during the negotiated settlement and corresponding Amended Decree of Divorce. Amended Decree of Divorce, pg. 1. (R. 326).
5. The Amended Decree of Divorce does not award any alimony to Mrs. Johnson. See Amended Decree ¶ 11. (R. 320).
6. The Amended Decree awards Mrs. Johnson the real property at 5629 West 6400 South in American Fork. Amended Decree ¶ 3(A). (R. 325). This property has been deeded to Mrs. Johnson. (R. 828-831)

7. The Amended Decree awards Mrs. Johnson the real property at 512 South 860 East, American Fork, Utah. Amended Decree ¶ 3(B). (R. 326). This property has been deeded to Mrs. Johnson. (R. 828-831)
8. In addition to the property described in the Amended Decree and set forth in paragraph 6 and 7 above, Mrs. Johnson was inadvertently deeded two additional parcels that were not contemplated under the Amended Decree of Divorce. (R. 828-831).
9. The Decree of Divorce awards Mrs. Johnson the sum of \$2,800,000, the real property and funds in the Smith Barney account. Amended Decree ¶ 5. (R. 322-323). Payment of the \$2,800,000 is to be paid in a monthly payment of \$8,333.33, commencing July 1, 2001. Amended Decree ¶ 5. (R. 322).
10. Any amounts still due and owing on July 1, 2006, shall be paid in full with one balloon payment due no later than July 1, 2006. Amended Decree ¶ 5(b). (R. 322)
11. The following sentence was crossed-out, deleted and initialed by the parties, "In the event payment is not timely made, the entire balance shall become immediately due and payable." Amended Decree ¶ 5(d). (R. 322)
12. In the Amended Decree, the parties specifically negotiated that Mrs. Johnson receive a secured interest in the "U-Check" real and personal property, to include all inventory, and that Mrs. Johnson shall be a lien holder in the second position behind the existing loan at Zion's bank in the approximate balance of \$600,000. Amended

Decree ¶ 5(e). (R. 322). The parties inserted the phrase, “Security to be a trust deed and trust deed note.” Amended Decree ¶ 5(e). (R. 322).

13. Mr. Johnson signed the trust deed note, the trust deed and the quit claim deed on August 28, 2002. (R. 834-838). Mr. Johnson’s counsel filed a Notice of Execution and Recordation of Deeds and Execution of Note with the district court on September 24, 2002. (R. 840). The notice contained a copy of the executed Trust Deed, Trust Deed Note and Quit-Claim Deed. (R. 828-840).
14. Mr. Johnson recorded the trust deed on September 4, 2002 as entry 102294:2002 with the Utah County Recorder. (R. 833-834)
15. Mr. Johnson sent a copy of the Trust Deed Note and the Trust Deed to the Court and to counsel for Mrs. Johnson on September 24, 2002. (R. 839-840)
16. Mrs. Johnson requested an order to show cause hearing alleging that Mr. Johnson was in contempt of court for not making the monthly payment under the decree of divorce. (R. 1824)
17. During the oral argument, Commissioner Patton asked Mr. Johnson’s counsel for a copy of the trust deed and trust deed note that had been signed and recorded by Mr. Johnson. March 7, 2003 Hearing (R. 1824, pg. 42 lines 20-22).
18. Commissioner Patton, sua sponte, took a ten minute recess so that he could review the documents in chambers. March 7, 2003 Hearing (R. 1824, pg. 42 lines 5-6).

19. When Commissioner Patton returned to the hearing, he asked Mr. Johnson's counsel why Mrs. Johnson had not signed either the trust deed or the trust deed note. March 7, 2003 (Hearing R. 1824 pg. 43 lines 6-7).
20. At the time of the March 7, 2003 hearing, Mrs. Johnson and her counsel had been in possession of the trust deed and trust deed note for seven months. They had been delivered to Mrs. Johnson's counsel on September 24, 2002. (R. 839-840) . During this seven month period, neither Mrs. Johnson nor her counsel had ever objected to the form of the trust deed or the trust deed note.
21. Commissioner Patton, sua sponte and without any pending objection before the Court or prompting by either party or their counsel, announced that the Court was "offended" by the trust deed note and Commissioner Patton announced that the trust deed note was "contemptuous." March 7, 2003 Hearing (R. 1824 pgs. 45-49).
22. Specifically, Commissioner Patton found that the following non-recourse language contained in the note was offensive, "[i]f maker fails to pay any payment provided by this note when due, the exclusive remedy of the holder of the Trust Deed and this note shall be the foreclosure of the Trust Deed and the holder shall not be entitled to recover from maker any deficiency under this note." March 7, 2003 Hearing (R. 1824 pgs. 46-47).

23. Commissioner Patton argued that under the case of *Brown v. Brown*, 744 P.2d 333 (Utah App. 1987), Mrs. Johnson was not bound by the Promissory Note because she had not signed the same. March 7, 2003 Hearing (R. 1824 pg. 47 lines 8-17).
24. Commissioner Patton then instructed Mrs. Johnson to draft a new trust deed note, changing the terms and conditions of the stipulated settlement, and ordered Mr. Johnson to sign the note. March 7, 2003 Hearing (R. 1824 pg. 48 lines 5-12).
26. At the July 28, 2003 Hearing, Judge Laycock attempted to draft a trust deed from the bench by ordering Mrs. Johnson's counsel to amend the trust deed prepared by her. See July 28, 2003 Hearing, pg. 70 lines 11-17 (R. 1823).
27. At the July 28, 2003 hearing, Mr. Johnson, through counsel, objected to the trust deed and trust deed note several times. See July 28, 2003 Hearing (R. 1823).
28. The parties have been unable to agree on the terms and conditions of a trust deed note. Judge Howard has now ordered that Mr. Johnson sign a trust deed prepared by Mrs. Johnson's counsel. Ruling and Order dated February 23, 2006 (R. 1789-1793). Mrs. Johnson filed an Order to Show Cause on April 29, 2005.

SUMMARY OF ARGUMENTS

1. This case involves a stipulated divorce decree that lacks the essential terms to be properly enforced by the Court. Several motions and hearings have been held to try and decipher, modify, clarify, interpret, create, reconstruct and enforce a divorce decree that lacks essential terms and is ambiguous. The district court's ruling that the stipulated decree of

divorce was not ambiguous should be reversed because the stipulated decree is subject to several interpretations with respect to the number of parcels deeded to Mrs. Johnson and the terms and conditions of the trust deed and trust deed note. In addition, the parties never had a meeting of the minds on the essential terms and conditions of the trust deed and trust deed note. Mr. Johnson understood that the trust deed would be a non-recourse trust deed at the time of the stipulated settlement. Mrs. Johnson claims that the trust deed was not a non-recourse trust deed. The stipulated settlement and the Amended Decree of Divorce are both silent on the terms and conditions of the trust deed and trust deed note. Therefore, the decree is ambiguous and the court should look to parol evidence to clarify the meaning of the decree or find the agreement unenforceable.

2. The stipulated settlement and subsequent decree of divorce based upon that stipulation was the result of the negotiation between Mr. Johnson and Mrs. Johnson. Both parties were represented by counsel during the negotiations. The district court did not have the authority to modify the terms of the stipulation or supply missing terms, unless such terms or conditions were statutorily mandated (such as child support). The district court's unilateral modification of the stipulation, by drafting language to insert into the trust deed and trust deed note, materially changed the stipulation between the parties and created a new agreement without the consent of Mr. Johnson. The modification of a stipulated settlement must be consented to by the parties making the stipulation. Otherwise, there is no meeting of the minds or mutual consent and the agreement is void.

3. Where the parties have voluntarily agreed to secure payment in a property settlement agreement with a trust deed, the plain language of the agreement requires the use of the trust deed to collect and overdue payment under the stipulated property settlement. The application of the one-action rule at Utah Code Annotated § 78-37-1 also serves to place the personal assets of Mr. Johnson beyond the reach of Mrs. Johnson until the value of the pledged property is exhausted.

4. A contempt proceeding violates Article I, Section 16 of the Utah Constitution—prohibiting imprisonment for debt— and therefore the trial court has no power to order payments on the property settlement or to use the contempt sanction to enforce the stipulated divorce decree.

5. Res Judicata does not apply to Mr. Johnson’s Motion to Set Aside the Divorce Decree because the prior proceeding did not meet the four elements required to be present for res judicata. Neither the district court or Mrs. Johnson provided any analysis on the four elements required for issue preclusion.

6. The award of attorney’s fees was erroneous because the Court awarded attorney’s fees incurred for motions not before the Court.

ARGUMENT

I. The Stipulated Amended Decree of Divorce is Not Enforceable

The alleged divorce decree lacks the integral features that are essential to the formation of an enforceable agreement. For the reasons set forth below, the district court

should have set aside the decree of divorce and allowed the parties to either renegotiate the decree on mutually agreeable terms and conditions or set the case for trial. Instead, the district court entered a ruling and order requiring Mr. Johnson to sign the newly prepared trust deed and trust deed note that Mr. Johnson did not agree to nor was the newly prepared trust deed or trust deed note part of the stipulation between the parties. Ruling and Order Re: Respondent's Objections to Newly Prepared Trust Deed Note and Trust Deed (R. 1800-1804).

A. No Meeting of the Minds

In *Nielsen v. Gold's Gym*, the Utah Supreme Court noted that "'a meeting of the minds on the integral features of an agreement is essential to the formation of a contract'" and, consequently, "'[a]n agreement cannot be enforced if its terms are indefinite.'" 78 P.3d 600, 602 (Utah 2003) (quoting *Richard Barton Enters. v. Tsern*, 928 P.2d 368, 373 (Utah 1996)). "It is fundamental that a meeting of the minds on the integral features of an agreement is essential to the formation of a contract. An agreement cannot be enforced if its terms are indefinite." *Richard Barton Enterprises, Inc. v. Tsern*, 928 P.2d 368, 373 (Utah 1996) (citations omitted); see also *Valcarce v. Bitters*, 362 P.2d 427, 428 (Utah 1961) ("A condition precedent to the enforcement of any contract is that there be a meeting of the minds of the parties, which must be spelled out, either expressly or impliedly, with sufficient definiteness to be enforced.").

It has become painfully apparent to everyone involved in this proceeding that there was no meeting of the minds with respect to the security pledged in the amended decree of divorce. In the amended decree of divorce, the parties negotiated that Mrs. Johnson receive a secured interest in the “U-Check” real and personal property, to include all inventory, and that Mrs. Johnson become a lien holder in the second position behind the existing loan at Zion’s bank in the approximate balance of \$600,000. Amended Decree of Divorce ¶ 5(e). (R. 322). The parties both initialed a handwritten provision in the payment section of the decree “Security to be a trust deed and trust deed note.” Amended Decree ¶ 5(e) (R. 322). Mr. Johnson provided a trust deed and trust deed note that was never objected to by Mrs. Johnson. Mr. Johnson believed at the time of the negotiated decree that the sole recourse of Mrs. Johnson would be to exercise her security interest in the store. Mrs. Johnson now claims that she believed that the security provided in the real and personal property of the U-Check store was not provided as her only recourse, as has been evidenced in her several motions for contempt and attempts to receive payment by attacking the personal assets of Mr. Johnson. Therefore, there was no meeting of the minds on this essential and critical point of the divorce decree and therefore the decree must be set aside.

In addition to the lack of understanding with respect to the security set forth in the Amended Decree, there was no meeting of the minds with respect to the real property distributed to the parties. Mrs. Johnson was inadvertently deeded two parcels of property that were neither authorized nor contemplated by the divorce decree. July 28, 2003 Hearing, pgs. 53-77 (R. 1823). Mrs. Johnson has taken the position that the real property was correctly

deeded to her. Mr. Johnson never contemplated nor understood that the divorce decree awarded these two parcels to Mrs. Johnson. The district court judge refused to receive and consider evidence regarding the original written stipulation of the parties that would have clarified the ambiguity. See July 28, 2003 Hearing, pg. 59 lines 4-7. (R. 1823). There was no meeting of the minds with respect to this critical provision in the amended decree of divorce and therefore it should be set aside. The extremely harsh result of attempting to enforce this aspect of the decree gives Mrs. Johnson a huge windfall and violates the equitable principles upon which the district court acting in domestic cases is founded. As set forth in the Amended Decree, both provisions referencing specific acreage of land were struck by the parties. See Amended Decree, ¶¶ 3(A) and 3(B). (R. 324-325). The subsequent conveyance of the acreage struck by the parties creates a tremendous windfall to Mrs. Johnson that the district court has refused to acknowledge or accept in the proceedings below.

B. Utah Courts Not Authorized To Fabricate Contracts

Utah Courts are not authorized to rewrite, modify or fabricate contract terms and conditions where the parties have failed to complete an agreement. In short, "where there was simply some nebulous notion in the air that a contract might be entered into in the future, the court cannot fabricate the kind of a contract the parties ought to have made and enforce it." *Valcarce v. Bitters*, 362 P.2d 427, 428-29 (Utah 1961). Commissioner Patton has unilaterally attempted to rewrite, modify and alter the terms and conditions of the amended

decree of divorce by imposing his own terms and conditions in the trust deed and trust deed note. Order to Show Cause Hearing of March 7, 2003, pgs. 42- 51. (R. 1824). The district court is not authorized to write or modify the divorce decree, when the parties had carefully negotiated the terms and conditions. Therefore, the amended decree of divorce should be set aside and the district court should give the parties the opportunity to negotiate the terms and conditions of the settlement.

C. Future Negotiations Make Contract Incomplete and Unenforceable

If there is "any uncertainty or indefiniteness, or future negotiations or considerations to be had between the parties, there is not a completed contract. In fact, there is no contract at all." *Candland v. Oldroyd*, 248 P. 1101, 1102 (Utah 1926). The amended decree of divorce does not set forth the terms and conditions of the trust deed and trust deed note. Because the terms and conditions of this critical part of the decree are left for future negotiations, there is not a completed contract and the matter must be set aside. "It is fundamental that a meeting of the minds on the integral features of an agreement is essential to the formation of a contract. An agreement cannot be enforced if its terms are indefinite." *Richard Barton Enters. v. Tsern*, 928 P.2d 368, 373 (Utah 1996) (citing *Pingree v. Cont'l Group of Utah, Inc.*, 558 P.2d 1317, 1321 (Utah 1976)); *Valcarce v. Bitters*, 362 P.2d 427, 428 (1961)) (additional citations omitted); *see also Candland v. Oldroyd*, 248 P. 1101, 1102 (1926) ("So long as there is any uncertainty or indefiniteness, or future negotiations or considerations to be had between the parties, there is not a completed contract. In fact, there

is no contract at all."). The court must be able to enforce the contract according to the parties' intentions; if those intentions are impenetrable, or never actually existed, there can be no contract to enforce.

D. Lack of Essential Terms Make Contract Invalid

"A contract may be enforced even though some contract terms may be missing or left to be agreed upon, but if the essential terms are so uncertain that there is no basis for deciding whether the agreement has been kept or broken, there is no contract." *Acad. Chicago Publishers v. Cheever*, 578 N.E.2d 981, 984 (Ill. 1991) (citations omitted). "Whether or not the [missing term] was essential to the contract requires an examination of the entire agreement and the circumstances under which the agreement was entered into." *Cessna Fin. Corp. v. Meyer*, 575 P.2d 1048, 1050 (Utah 1978). Merely satisfying the minimum requirements for the statute of frauds does not automatically render all contracts sufficiently definite to be enforced by the courts. The terms and conditions of the trust deed and trust deed note are essential terms to the decree of divorce. Because the parties failed to negotiate the terms and conditions of the trust deed and trust deed note, the decree must be set aside.

E. Contract Unenforceable if Lacks Sufficient Definiteness to be Enforced

An unenforceable agreement to agree occurs when parties to a contract fail to agree on material terms of the contract "with sufficient definiteness to be enforced." *Cottonwood Mall Co. v. Sine*, 767 P.2d 499, 502 (Utah 1988) (quoting *Valcarce v. Bitters*, 362 P.2d 427,

428 (Utah 1961)). The present action provides a living example of what happens when material terms are omitted from an agreement and then one of the parties attempts to enforce the agreement. In this case, Petitioner has attempted to enforce the agreement via contempt proceedings, when her exclusive remedy under Utah's one-action rule is to proceed against the security of the trust deed and trust deed note in the U-check real and personal property. The terms and conditions of the trust deed and trust deed note have not been finalized, negotiated or completed by the parties, therefore the amended decree is impossible to enforce and should be set aside.

F. To Be Valid, Modification Requires Mutual Consent, Not Unilateral Modification

"[P]arties to a contract may, by mutual consent, modify any or all of a contract." *Pasker, Gould, Ames & Weaver, Inc. v. Morse*, 887 P.2d 872, 877 (Utah Ct. App. 1994) (quotations and citation omitted). "A valid modification of a contract . . . requires 'a meeting of the minds of the parties, which must be spelled out, either expressly or impliedly, with sufficient definiteness.'" *Richard Barton Enters., Inc. v. Tsern*, 928 P.2d 368, 373 (Utah 1996) (quoting *Valcarce v. Bitters*, 362 P.2d 427, 428 (1961)); see *Scott v. Majors*, 980 P.2d 214 (Ut. Ct. App. 1999) (noting that to "alter, or supplant a contract fairly made," "[t]he same meeting of the minds is needed that was necessary to make the contract in the first place" (quotations, emphasis, and citation omitted)). ""[C]ontractual mutual assent requires assent by all parties to the same thing in the same sense so that their minds meet as to all the terms." *Cessna Fin. Corp. v. Meyer*, 575 P.2d 1048, 1050 (Utah 1978); see also *Sackler v. Savin*, 897

P.2d 1217, 1220-22 (Utah 1995) (holding that to form an enforceable contract, there must be a meeting of the minds on the essential terms of the agreement).

In the present action, Commissioner Patton unilaterally ordered Mrs. Johnson to draft the terms and conditions of the trust deed and trust deed note and Judge Howard's February 23, 2006 Order now requires that Mr. Johnson sign a trust deed and trust deed note that he did not agree to nor were the terms and conditions set forth in the Amended Decree of Divorce. The district court's unilateral modification of the divorce decree is a contract modification without mutual consent and therefore invalid. It is axiomatic that both parties to the agreement must consent to and agree upon the terms and conditions of the trust deed and trust deed note. The district court does not have the ability to force one party to agree to a modification to a stipulated decree of divorce. Therefore, the decision of the district court requiring Mr. Johnson to sign the newly prepared trust deed and trust deed note should be reversed.

II. The Use of Contempt Proceedings are Barred by the Stipulated Amended Decree of Divorce and the Utah One-Action Rule

The trial court summarily dismissed Mr. Johnson's request to apply the one-action rule and provisions of the trust deed statute to this proceeding. See R. 1758-1761. No explanation or reasoning is set forth in the Court's ruling. *Id.* The entire analysis set forth in the trial court's order states, "[t]he issue of the 'one action rule' was raised by the Respondent and the court held that the one-action rule did not apply to the proceedings held on January 23, 2006." *Id.* at 1760. The lack of analysis set forth in the record below is

sufficient cause to remand the proceeding to the trial court for a full explanation of why the one action doesn't apply to the facts of this proceeding. However, the court of appeals can give guidance to the trial court on remand.

First and foremost, the parties agreed in the stipulated Amended Decree of Divorce to use a trust deed and trust deed note to secure payments to Mrs. Johnson. Instead of foreclosing on the trust deed, Mrs. Johnson has attempted, through contempt proceedings, to attack the personal assets of Mr. Johnson. The protections provided in the Utah Trust Deed Act, Utah Code Ann. § 57-1-19 et seq. and Utah's one-action rule require that Mrs. Johnson foreclose on the trust deed.

In *Surety Life Ins. Co. v. Smith*, 892 P.2d 1 (Utah 1995), the Utah Supreme Court found that the Utah Trust Deed Act did not concern itself with which contract or instrument the action is founded on, but rather the issue is whether the action is one to recover the balance due upon the obligation for which the trust deed was given as security. *Id.* at 3. In *Smith*, the Utah Supreme Court applied the protections of the Trust Deed Act to guarantors as well as debtors, finding that the act makes no distinctions as to whether the action is brought against the debtor or a guarantor. Under the Trust Deed Act, after a breach of an obligation for which the trust property is conveyed as security, the trustee is given the power of sale by which the trustee may cause the trust property to be sold pursuant to the Trust Deed Act. Utah Code Ann. § 57-1-23.

The one-action rule provides that “[t]here can be but one action for the recovery of any debt *or the enforcement of any right* secured solely by mortgage upon real estate....” Utah Code Ann. § 78-37-1 (emphasis added). The Utah Supreme Court has declared that “[t]he underlying purpose of the single-action statute is to preclude the creditor from waiving the security and suing directly on the contract to pay money and hold the debtor rather than the security primarily liable.” *APS v. Briggs*, 927 P.2d 670, 673 (Utah App. 1996)(citations omitted). Under this rule, “[a] creditor must foreclose and have a deficiency determined by the court proceeding against the debtor personally.” *City Consumer Servs. v. Peters*, 815 P.2d 234, 235 (Utah 1991)(citations omitted). Utah courts have applied the one-action rule to prevent personal liability on the part of the debtor until after foreclosure or sale of the security and then only for the deficiency then remaining unpaid. *Timm v. Dewsnup*, 86 P.3d 699, 704 (Utah 2003) citing *Lockhart v. Equitable Realty Co.*, 657 P.2d 1333, 1334 (Utah 1983). “The one-action represents a policy preference that, when available, real property collateral be used before the debtor’s personal assets to satisfy debts. One commentator has observed that absent this security-first requirement, the creditor could ‘dispose of any of a debtor’s assets the creditor chooses and disrupt the debtors preferences in that regard. A creditor’s method of disposing of the assets also could realize fewer net proceeds than a method chosen by a debtor.’ J. David Milliner, Real Property Collateral: The “One-Action Rule in Action, 1991 Utah L.Rev. 557, 559.” *APS*, 927 P.2d at 673.

The one-action rule's requirement that the security be exhausted first is primarily intended to protect the debtor. However, the rule does not impair the right of the creditor to recover on its loan. *Id.* As the Utah Supreme Court has stated, "The purpose of the one-action rule is to regulate the procedure of recovery of a secured creditor, not to deny the creditor's contract right to recover on its loan." *APS*, 927 P.2d at 673 (citations omitted). "The fundamental lesson to be drawn from our cases interpreting the one action rule is that the primary objective is to place the personal assets of a mortgagor beyond the reach of a mortgagee until the value of the pledged property is exhausted." *Dewsnup*, 86 P.3d at 705.

Utah courts have extended the reach of the one-action rule to trust deeds. Although the rule speaks in terms of a "mortgage," Utah cases, as well as cases from many other jurisdictions, have held that the one-action rule applies to trust deeds, as in this divorce proceeding, as well as to mortgages. *City Consumer Servs. v. Peters*, 815 P.2d 234, 236 (Utah 1991); *See also First Sec. Bank of Utah, N.A. v. Felger*, 658 F. Supp. 175, 181 (D.Utah 1987); *Utah Mortgage & Loan Co. v. Black*, 618 P.2d at 43; Hetland, *Deficiency Judgment Limitations in California: A New Judicial Approach*, 51 Cal. L.Rev. 1, 35 (1963); *Keever v. Nicholas Beers Co.*, 611 P.2d 1079, 1082 (Nev. 1980). Justice Traynor, in a case interpreting the California one-action rule, emphasized that the effect of the one-action rule is to limit a creditor's *means* of enforcing its debt but not the *right* to recover:

In the absence of a statute to the contrary, a creditor secured by a trust deed or mortgage on real property may recover the full amount of the debt upon default. He may realize the security or sue on the obligation or both. . . . In most states now, however, the creditor's right to enforce such a debt is restricted by statute. . . . [T]he creditor must rely upon his security *before* enforcing the debt. *Roseleaf Corp. v. Chierighino*, 59 Cal.2d 35, 36, 378 P.2d 97, 98, 27 Cal.Rptr. 873, 874 (1963) (emphasis added). *Peters*, 815 P.2d at 236.

Utah's one-action rule provides that "[t]here can be but one action for the recovery of *any* debt or the enforcement of *any* right secured solely by mortgage upon real estate...." Utah Code Ann. § 78-37-1 (emphasis added). The Utah Court of Appeals relied on the language of the one-action statute, interpreted in accordance with the purpose of the rule, in finding that comakers who provide none of the security on a loan are nevertheless protected by the one-action rule. *APS v. Briggs*, 927 P.2d 670, 674 (Utah App. 1996).

In *Briggs*, four parties signed a trust deed note, which held them jointly and severally liable to pay \$75,000. The note was secured by a trust deed executed solely by only one of the parties. The Utah Court of Appeals applied the one-action rule to prevent the personal liability of the three individuals that did not provide security based on the following broad language in the one-action rule: "any debt...secured by mortgage upon real estate." *Id.* "The statute does not contain language restricting the rule's application to only those debts secured

by that particular debtor's real property. The lack of such restrictive language suggests that whether the debtor and the mortgagor are the same party or are two different parties is of no consequence. In either case the debt is secured by the mortgage and all primary debtors are entitled to the protections of the one-action rule." *Id.*

The broad language in the one-action rule statute that "any debt" or "any right" secured by a trust deed is subject to the one-action rule makes the statute applicable to the stipulated agreement between the parties. Although Mrs. Johnson claims the one-action rule is inapplicable because the property settlement does not constitute a debt, the one-action rule applies to the "enforcement of any right" secured by a trust deed. The broad language of the statute, as well as the purpose behind the one-action rule, support applying the rule to the present case. The litigious nature of the parties often present in domestic disputes can be minimized by application of the one-action rule where parties to such disputes agree to secure payments by use of trust deeds and trust deed notes. Therefore, the decision of the trial court finding the one-action rule inapplicable should be reversed.

III. Contempt Proceedings Violate The Utah Constitution

Mr. Johnson filed an objection to Mrs. Johnson's use of contempt proceedings in the underlying case based on Article I, Section 16 of the Utah Constitution— prohibiting imprisonment for debt. The district court's reliance upon *Hamilton v. Regan*, 938 P.2d 282 (Utah 1997) and *Bott v. Bott*, 453 P.2d 402 (Utah 1969) to find that the contempt proceeding did not violate the constitution was misplaced. Ruling Re: Order to Show Cause. See R.

1738 - 1739. In addition, the district court relied upon the holding in *Bott* and viewed the monthly payments under the stipulated divorce decree as payments for support and maintenance, despite the fact that the stipulated divorce decree specifically states that no alimony is awarded. Because the district court turned the monthly payments into support and maintenance payments under *Bott*, then support and maintenance was statutorily terminated by Utah Code Ann. § 30-3-5(9) when Mrs. Johnson remarried over four years ago.

In *Hamilton v. Regan*, the Utah Supreme Court affirmed the district court's finding of contempt and placing defendant in jail for twenty days when he failed to pay past due child support. The defendant argued that the contempt proceeding violated article I, section 16 of the Utah Constitution, prohibiting imprisonment for debt. The Utah Supreme Court found that the courts could use the contempt power for enforcement purposes to safeguard the interests and welfare of children. The Court, citing *Harmon v. Harmon*, 491 P.2d 231, 232-33 (Utah 1971), stated that contempt measures are better suited to the purpose of protecting the interests and welfare of children. In the present case, there are no minor children at issue and therefore the reasoning in *Hamilton* and *Harmon* do not apply to this proceeding.

Likewise, the holding in *Bott* is not applicable to this proceeding because the decree in *Bott* did not provide a trust deed and trust deed note as a means of securing the monthly payments. In the present action, the parties both agreed that a trust deed and trust deed note would secure the monthly payments. By holding contempt proceedings, the district court

completely changes the agreement of the parties and imposes conditions on Mr. Johnson that he did not agree to in the stipulated decree. In the decree, the parties agreed that the trust deed and trust deed note would secure the monthly payments, not contempt proceedings. In fact, the parties struck the acceleration provision in the decree that would have made the entire property settlement due upon untimely payments. The parties contemplated, negotiated and agreed upon the use of the trust deed and trust deed note as security for the property settlement. The district court does not have the jurisdiction to ignore the parties agreement and impose contempt proceedings in place of the trust deed and trust deed note.

Finally, the district court relied upon the decision in *Bott* to reclassify the monthly payment due under the divorce decree as support and maintenance. Under Utah Code Ann. § 30-3-5(9), support and maintenance was terminated when Mrs. Johnson remarried over four years ago. Therefore, the monthly payments are no longer due and the matter is moot. The district court can't have it both ways, viewing the monthly payments as support and maintenance for purposes of the contempt power, but viewing the payments as a property settlement for purposes of section 30-3-5(9). Therefore, should the monthly payments continue to be classified as support and maintenance payments for Mrs. Johnson under *Bott*, then the payments are no longer due since Mrs. Johnson remarried over four years ago.

IV. Res Judicata Not Applicable to Motion to Set Aside

The trial court found that the issues set forth in Mr. Johnson's Motion to Set Aside the Decree of Divorce filed on January 13, 2006 were already addressed and ruled on at a

hearing held on July 28, 2003 before the Honorable Judge Claudia Laycock. See Ruling Re: Petitioner's Objection to Notice to Submit in Re: Respondent's Motion to Set Aside Decree of Divorce, pg. 2 (R. 1780-1781). While the trial court failed to make a specific finding whether the basis of the decision was issue preclusion or claim preclusion, it appears that the trial court relied upon issue preclusion as the basis for its decision. A trial court's determination of whether res judicata bars an action presents a question of law. See *Macris & Assocs., Inc. v. Neways, Inc.*, 16 P.3d 1214 (Ut. 2000). The court of appeals should review such questions for correctness, according no particular deference to the trial court. *Id.*

"Issue preclusion, also referred to as collateral estoppel, prevents parties or their privies from relitigating issues which were once adjudicated on the merits and have resulted in a final judgment." *3D Constr. & Dev., v. Old Standard Life Ins.*, 117 P.3d 1082 (Ut. App. 2005) (alteration omitted) (*quoting Brigham Young Univ. v. Tremco Consultants, Inc.*, 110 P.3d 678 (Ut. 2005)). In order for issue preclusion to apply, four elements must be present: "[1] The party against whom issue preclusion is asserted must have been a party to or in privity with a party to the prior adjudication; [2] the issue decided in the prior adjudication must be identical to the one presented in the instant action; [3] the issue in the first action must have been completely, fully, and fairly litigated; and [4] the first suit must have resulted in a final judgment on the merits." *Id.* (alterations in original). "If any one of these requirements is not satisfied, there can be no

preclusion." *Hill v. Seattle First Nat'l Bank*, 827 P.2d 241, 245 (Utah 1992). The burden of establishing each of the elements of res judicata is on the party invoking the doctrine. See *PGM, Inc. v. Westchester Inv. Partners*, 995 P.2d 1252 (Ut. App. 2000); see also *Timm v. Dewsnup*, 851 P.2d 1178, 1184 (Utah 1993).

Neither the Court's decision (R. 1780-1781) nor the objection filed by Mrs. Johnson (R. 1659-1661) discuss the four elements that must be present for issue preclusion to apply. The lack of any analysis on the record below should be sufficient for the court to remand for clarification from the trial court.

V. Attorneys Fees Not Appropriate

The district court entered an order awarding Mrs. Johnson attorney's fees in preparing for and attending the hearing of January 23, 2006 in the amount of \$5,142.50. See Order In Re: January 23, 2006 Hearing (R. 1759 - 1761). The affidavit submitted by Mrs. Johnson's counsel to prepare for and attend the January 23, 2006 hearing does not explain the charges set forth in the affidavit and contains several hearing dates other than the January 23, 2006 hearing which was awarded by the district court. See Affidavit of Attorney's Fees (R. 1650-1654). Mr. Johnson's counsel objected to the affidavit of attorney's fees as excessive and not applicable to the January 23, 2006 hearing. See Objection to Affidavit of Attorney's Fees Dated February 6, 2006 (R. 1747-1748). The Court found that given the history of the case and the difficulty in bringing the matter for hearing with the parties and their counsel present, the services rendered by Mrs.

Johnson's counsel were reasonably necessary to prepare for and attend the January 23, 2006 hearing. Ruling Re: Affidavit of Attorney's Fees (R. 1755-1757). In the ruling, the district court awarded the Petitioner the amount of \$5,142.50 and entered the same in the Order, In Re: January 23, 2006 Hearing that was signed by the district court on February 27, 2006. (R. 1759-1761). Nothing in the district court's ruling and order set forth why the attorney's fee award included charges from as far back as 2004 for items such as "preparing a case summary" and "reviewing the file".

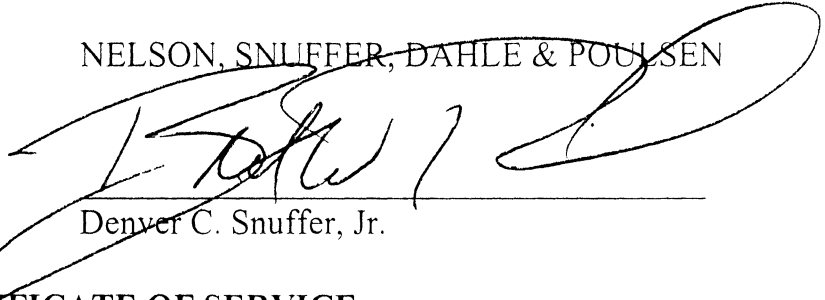
CONCLUSION

Pursuant to the foregoing arguments and law, Mr. Johnson respectfully requests this Court overrule the District Court's decision upholding the Amended Decree of Divorce as unambiguous, enforceable. In addition, Mr. Johnson requests that the Court of Appeals reverse the decision of the district court requiring Mr. Johnson to sign a trust deed and trust deed note that was not stipulated to by Mr. Johnson. Mr. Johnson requests that the Court of Appeals find the use of contempt proceedings violates the Amended Decree of Divorce, which provides security in the form of a trust deed and trust deed note. Likewise, Mr. Johnson requests that the Court of Appeals find the use of contempt proceedings in this instance, where the parties have mutually agreed to secure payments under the Amended Decree with a trust deed, and where no alimony or child support was ordered, violates the Utah Constitution as discussed above. Mr. Johnson requests that the district court provide explanation of its finding that res judicata prevents Mr. Johnson

from filing his Motion to Set Aside the Divorce Decree. Finally, Mr. Johnson requests that the Court of Appeals reduce the award of attorney's fees to only those fees incurred by Mrs. Johnson's counsel in preparation for and attending the January 23, 2006 hearing.

DATED this 24 day of October, 2006.

NELSON, SNUFFER, DAHLE & POULSEN

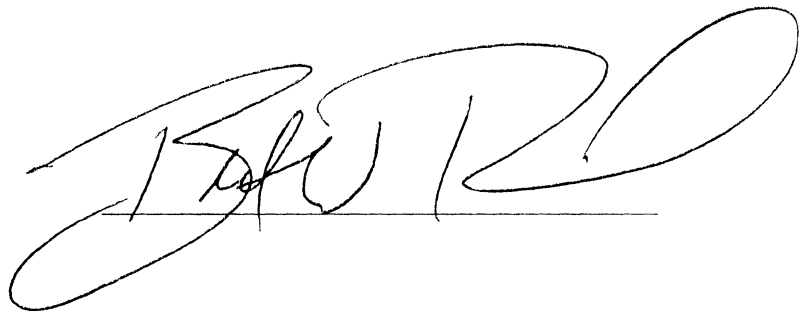

Denver C. Snuffer, Jr.

CERTIFICATE OF SERVICE

I hereby certify that I served two true and correct copies of the foregoing **PETITIONER'S OPENING BRIEF ON APPEAL**, via first class mail, postage prepaid, on the following:

Rosemond G. Blakelock
75 South 300 West
Provo, Utah 84601
Attorneys for Appellee/Petitioner

on this 24 day of October, 2006.



Appendix

- 1 Amended Decree of Divorce
- 2 Amended Findings of Fact and Conclusions of Law

Rosemond Blakelock #6183
Attorney for Petitioner
305 East 300 South
Provo, Utah 84606
Telephone: (801) 375-7678

IN THE FOURTH DISTRICT COURT OF UTAH COUNTY
STATE OF UTAH
125 North 100 West, Provo, Utah 84601

INA MARIE JOHNSON,
Petitioner,

V.

NELDON PAUL JOHNSON,
Respondent.

*
* AMENDED
* DECREE OF DIVORCE
*
*
*
*
* Case No. 004401468
* Judge James Taylor
*

This matter came before the Court on the 29th day of May, 2001, before the Honorable James Taylor, as for trial on the issues. The parties heretofore have been granted a Bifurcated Decree of Divorce. Present was the Petitioner and her co-counsel, Frederick Jackman and Rosemond Blakelock. The Respondent was also present and represented by counsel, Don Petersen.

The Court heard from the parties and accepted the stipulation which was read into the record. The parties and all counsel submitted to the Court a stipulation which drafted by hand by counsel for the Respondent, and accepted the additions which were cited into the record by all counsel. The Court then inquired of both parties, on the record, whether they accepted

the stipulation. The Court accepted their affirmation that they both agreed to be bound by the stipulation and accepted their affirmations that they understood the stipulation. The Court then examined the file and the contents therein and deeming itself to be fully informed in the premises, having issued Amended Findings of Fact, now issues the following;

AMENDED DECREE OF DIVORCE

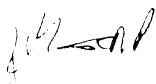
1. The parties were previously granted a bifurcated Decree of Divorce and the Amended Decree shall set forth the final orders in this matter.

2. The stipulation, to be effective on and after May 29, 2001.

3. The Petitioner shall be awarded the following real property, subject to the encumbrance that existed on the real property on the date of the parties' separation in this matter, June 5, 2000.


A. the real property and surrounding acreage located at 5629 West 6400 North, American Fork Utah. The

Petitioner is awarded all right and title to the house.

 ~~and approximately 9 acres of land.~~ The Petitioner shall be solely responsible for the debt on the real property

that existed at the time of the parties' separation and shall hold Respondent harmless therefrom. Respondent warrants that he has placed no additional debt on the real property since the parties separation and Petitioner warrants that she has placed no additional debt on the property since the parties' separation. Respondent shall immediately sign any Quit Claim Deed necessary to cause the real property to be held solely in the name of the Petitioner.

B. The real property and surrounding acreage located at 512 South 860 East, American Fork, Utah 84003. The Petitioner is awarded all right and title, ~~and~~

 ~~approximately 5.55 acres of land.~~ The Petitioner shall be solely responsible for the debt on the real property that existed at the time of the parties' separation and shall hold Respondent harmless therefrom. Respondent warrants that he has placed no additional debt on the real property since the parties separation and Petitioner warrants that she has placed no additional debt on the property since the parties' separation. Respondent shall immediately sign any Quit Claim necessary to cause the real property to be held solely in the name of the Petitioner.

4. The Petitioner shall be awarded all funds held in the parties' Smith Barney Account. A separate order of release to the Petitioner shall issue. The Court finds that the attorney's fees of Frederick Jackman, Rosemond Blakelock, and Don Petersen that were incurred should be paid from the funds held in the Smith Barney Account and the remainder of the funds shall then be released to the Petitioner.

5. The parties currently own in excess of eight million shares of stock in International Automated Systems (also known as IAS). The Court finds that the parties own a business known as "U-Check". The Court finds that because a that a split of the International Automated Systems stock would not be practical that the Petitioner should be awarded, as for Petitioner's share of the parties stock in International Automated System and Petitioner's share of the "U-Check" company, the sum of \$2,800,000.00 (two million eight hundred thousand dollars), as well as the funds in the Smith Barney Account, as is set forth above. The sum of \$2,800,000.00, the funds in the Smith Barney account, as well as the award of real property, shall be Petitioner's one-half share of the property settlement. The Respondent shall then be awarded the remaining shares in International Automated Systems and the business known as "U-

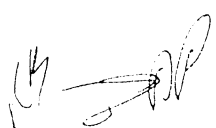
Check", which shall be the Respondent's share of the property settlement.

The Respondent shall pay the Petitioner as for her share in the above stated property as follows;


a. Respondent shall pay to the Petitioner the sum of \$8,333.33 per month, on or before the 15th of each month, commencing July 1, 2001.

b. Any amounts still due and owing on July 1, 2006, shall be paid in full with one balloon payment due no later than July 1, 2006.

c. There shall be no pre-payment penalty, in the case that the Respondent pays the sums due and owing to Petitioner prior to the date of July 1, 2006.

 d. ~~In the event payment is not timely made, the entire balance shall become immediately due and payable.~~

e. Petitioner shall be granted a secured interest in the "U-Check" real and personal property, to include all inventory, and shall be a lien holder in the second position behind the existing loan at Zion's bank in the

 approximate balance of \$600,000.00. *Security To Be A TRUST DEED AND TRUST DEED NOTE.*

6. The Respondent shall be awarded all patents, patents pending and ideas that he has created.

7. The Court finds that the protective order in case number 004401493 should be dismissed and that a mutual restraining order shall issue, which permanently restrains both parties from bothering, harassing or harming each other at any time or any place.

8. The Respondent shall be responsible for all debts associated with the parties' various business interests and should hold the Petitioner harmless therefrom, including the business debt at Zions Bank and debts on any credit cards, which were incurred prior to the parties' separation, as for business debts. Petitioner should deliver to the Respondent a list of any remaining business debts of which she is aware and the Respondent shall then pay the debts, provided that the debt was associated with the parties' business interests.

9. Each party shall be responsible for any debt he/she incurred since the parties separation on June 5, 2000 and that each should hold the other harmless from any responsibility on any debts individually incurred by either party.

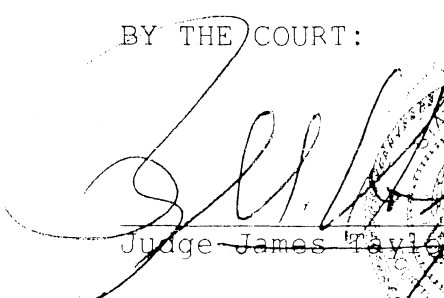
10. The parties personal property should be divided, one-half to each party. The property should be divided by the parties drafting a list of all personal property acquired during marriage and dividing the personal property equally between the parties. The Court finds that if the parties cannot agree to an equal

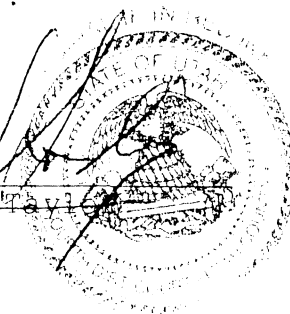
division of the property that the court may consider ordering the property sold.

11. In consideration of the foregoing award, there should be no award of alimony to Petitioner.

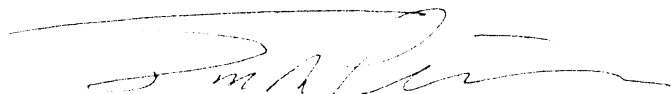
DATED and signed this 27th day of June, 2001.

BY THE COURT:


Judge James Taylor



Approved as to form



APPROVED AS TO FORM:


Don Petersen

Rosemond Blakelock #6183
Attorney for Petitioner
305 East 300 South
Provo, Utah 84606
Telephone: (801) 375-7678

IN THE FOURTH DISTRICT COURT OF UTAH COUNTY
STATE OF UTAH
125 North 100 West, Provo, Utah 84601

INA MARIE JOHNSON,
Petitioner,

v.

NELDON PAUL JOHNSON,
Respondent.

*
* AMENDED
* FINDINGS OF FACT
* AND CONCLUSIONS OF LAW
*

*
* Case No. 004401468
* Judge James Taylor
*

This matter came before the Court on the 29th day of May, 2001, before the Honorable James Taylor, as for trial on the issues. The parties heretofore have been granted a Bifurcated Decree of Divorce. Present was the Petitioner and her co-counsel, Frederick Jackman and Rosemond Blakelock. The Respondent was also present and represented by counsel, Don Petersen.

The Court heard from the parties and accepted the stipulation which was read into the record. The parties and all counsel submitted to the Court a stipulation which drafted by hand by counsel for the Respondent, and accepted the additions which were cited into the record by all counsel. The Court then inquired of both parties, on the record, whether they accepted

the stipulation. The Court accepted their affirmation that they both agreed to be bound by the stipulation and accepted their affirmations that they understood the stipulation. The Court then examined the file and the contents therein and deeming itself to be fully informed in the premises, orders and rules as follows;

AMENDED FINDINGS OF FACT

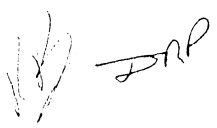
1. The Court finds that the finds that the parties were previously granted a bifurcated Decree of Divorce.

2. The Court finds that the parties entered into a written stipulation, to be effective on and after May 29, 2001.

3. The Court finds that the Petitioner should be awarded the following real property, subject to the encumbrance that existed on the real property on the date of the parties' separation in this matter, June 5, 2000.

A. the real property and surrounding acreage located at 5629 West 6400 North, American Fork Utah. The

Petitioner is awarded all right and title to the house,

 ~~and approximately 9 acres of land.~~ The Petitioner shall

be solely responsible for the debt on the real property

that existed at the time of the parties' separation and

shall hold Respondent harmless therefrom. Respondent

warrants that he has placed no additional debt on the real property since the parties separation and Petitioner warrants that she has placed no additional debt on the property since the parties' separation. Respondent shall immediately sign any Quit Claim Deed necessary to cause the real property to be held solely in the name of the Petitioner.

B. The real property and surrounding acreage located at 512 South 860 East, American Fork, Utah 84003. The Petitioner is awarded all right and title, and

JK *ZAP* ~~approximately 5.55 acres of land.~~ The Petitioner shall be solely responsible for the debt on the real property that existed at the time of the parties' separation and shall hold Respondent harmless therefrom. Respondent warrants that he has placed no additional debt on the real property since the parties separation and Petitioner warrants that she has placed no additional debt on the property since the parties' separation. Respondent shall immediately sign any Quit Claim necessary to cause the real property to be held solely in the name of the Petitioner.

4. The Court finds that the Petitioner should be awarded all funds held in the parties' Smith Barney Account. A separate order

of release to the Petitioner shall issue. The Court finds that the attorney's fees of Frederick Jackman, Rosemond Blakelock, and Don Petersen that were incurred should be paid from the funds held in the Smith Barney Account and the remainder of the funds shall then be released to the Petitioner.

5. The Court finds that the parties currently own in excess of eight million shares of stock in International Automated Systems (also known as IAS). The Court finds that the parties own a business known as "U-Check". The Court finds that because a that a split of the International Automated Systems stock would not be practical that the Petitioner should be awarded, as for Petitioner's share of the parties stock in International Automated System and Petitioner's share of the "U-Check" company, the sum of \$2,800,000.00 (two million eight hundred thousand dollars), as well as the funds in the Smith Barney Account, as is set forth above. The sum of \$2,800,000.00, the funds in the Smith Barney account, as well as the award of real property, shall be Petitioner's one-half share of the property settlement. The Respondent shall then be awarded the remaining shares in International Automated Systems and the business known as "U-Check", which shall be the Respondent's share of the property settlement.

The Respondent shall pay the Petitioner as for her share in the above stated property as follows;

a. Respondent shall pay to the Petitioner the sum of \$8,333.33 per month, on or before the 15th of each month, commencing July 1, 2001.

b. Any amounts still due and owing on July 1, 2006, shall be paid in full with one balloon payment due no later than July 1, 2006.

c. There shall be no pre-payment penalty, in the case that the Respondent pays the sums due and owing to Petitioner prior to the date of July 1, 2006.

d. ~~In the event payment is not timely made, the entire balance shall become immediately due and payable.~~

e. Petitioner shall be granted a secured interest in the "U-Check" real and personal property, to include all inventory, and shall be a lien holder in the second position behind the existing loan at Zion's bank in the

approximate balance of \$600,000.00. *Security To Be A TRUST DEED AND TRUST DEED NOTE. See Affidavit to Court file.*

6. The Court finds that the Respondent should be awarded all patents, patents pending and ideas that he has created.

7. The Court finds that the protective order in case number 004401493 should be dismissed and that a mutual restraining order shall issue, which permanently restrains both parties from

bothering, harassing or harming each other at any time or any place.

8. The Court finds that the Respondent should be responsible for all debts associated with the parties' various business interests and should hold the Petitioner harmless therefrom, including the business debt at Zions Bank and debts on any credit cards, which were incurred prior to the parties' separation, as for business debts. Petitioner should deliver to the Respondent a list of any remaining business debts of which she is aware and the Respondent shall then pay the debts, provided that the debt was associated with the parties' business interests.

9. The Court finds that each party shall be responsible for any debt he/she incurred since the parties separation on June 5, 2000 and that each should hold the other harmless from any responsibility on any debts individually incurred by either party.

10. The Court finds that the parties personal property should be divided, one-half to each party. The property should be divided by the parties drafting a list of all personal property acquired during marriage and dividing the personal property equally between the parties. The Court finds that if the parties cannot agree to an equal division of the property that the court may consider ordering the property sold.

11. In consideration of the foregoing award, there should be an award of alimony to Petitioner.

BASED upon the foregoing Findings of Facts, the Court now issues and orders as follows;

CONCLUSIONS OF LAW

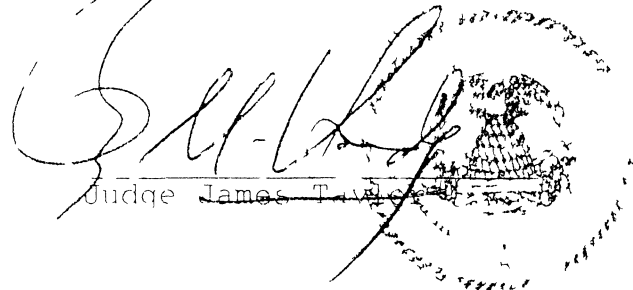
1. The Court concludes as a matter of law that it has subject matter and personal jurisdiction over the parties and issues of the case.

2. The Court concludes as a matter of law that the Petitioner is entitled to an Amended Decree of Divorce from the Respondent, based upon the grounds of irreconcilable differences and that therefore, adequate grounds exist for the granting of the divorce.


3. A Decree of Divorce should be granted and issued which is consistent with the orders as set forth above.

DATED and signed this 27th day of June, 2001

BY THE COURT:


Judge James T. [unclear]

APPROVED AS TO FORM:


Don Petersen